Office - Supreme Court, U.S.
FILED
SEP 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

IRVING B. BUSHLOW
Counsel of Record for Petitioner
26 Court Street
Brooklyn, N.Y. 11242
(212) MA 5-1336

MORRIS CIZNER
160 Broadway
New York, N.Y. 10038
(212) 227-1350

TABLE OF CONTENTS

REPLY BRIEF

Page

I

WITHOUT MERIT IS RESPONDENT'S CONTENTION THAT THE STATE INSURANCE FUND'S REASSIGNMENT TO PETITIONER OF THE LATTER'S CAUSE OF ACTION FOR PERSONAL INJURY DAMAGES IS WITHOUT FORCE OR EFFECT BECAUSE, RESPONDENT CONTENDS, THE REASSIGNMENT IS PROHIBITED BY NEW YORK STATE LAW. 2

CONCLUSION:

For the foregoing reasons, as well as those set forth in the petition for writ of certiorari, the petition for said writ should be granted. 6-7

TABLE OF AUTHORITIES

Cases

	Page
Caldwell v. Ogden Sea Transport (4 Cir., 1980), 618 F. 2d 1037, 1048	3, 4, 6
De Luzio Transamerican Trailer Transport, Inc. a/k/a Transamerican Trailer Ferry, Inc., not reported; (New York Supreme Court, New York County, Index #12339/80; March 23, 1981	5
Hroncich v. Sun Export Holding Corp., not reported; (New York Supreme Court; New York County, Index # 10877/81; Greenfield, J.; June 23, 1982)	3-4
Marullo v. Reederei Richard Schroeder, K.G.(D.C.S.D.N.Y. July 30, 1980), not reported . .	5
Susino v. Akrion Shipping Co., S.A.; not reported; (New York Supreme Court, New York County, Index # 13029/80; July 21, 1980; Wallach, Richard W., J.. . . .	5

TABLE OF AUTHORITIES
(continued)

Page

Statutes

New York: General Obligations
Law, section 13-101 2

APPENDIX OF UNREPORTED DECISIONS

Page

De Luzio v. Transamerican Trailer Transport Inc., a/k/a Transamerican Trailer Ferry, Inc.; not reported; New York Supreme Court, New York County; Index # 12339/80; March 23, 1981 . . . . . A 2

Hroncich v. Sun Export Holding Corp.; not reported; New York Supreme Court, New York County; Index # 10877/81; Greenfield, J., June 23, 1982. . . . . A 10

Marullo v. Reederei Richard Schroeder, K.G., not reported; United States District Court, Southern District of New York, 79 Civ. 3757; July 30, 1980; Gerard L. Goettel, D.C. . . . . A 16

Susino v. Akrion Shipping Co., S.A., not reported; New York Supreme Court, New York County; Index #13029/80; July 21, 1980 . . . . . A 19

No. 81-2315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANGELO DEL RE,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

I

WITHOUT MERIT IS RESPONDENT'S CONTENTION THAT THE STATE INSURANCE FUND'S REASSIGNMENT TO PETITIONER OF THE LATTER'S CAUSE OF ACTION FOR PERSONAL INJURY DAMAGES IS WITHOUT FORCE OR EFFECT, BECAUSE, RESPONDENT CONTENDS, THE REASSIGNMENT IS PROHIBITED BY NEW YORK STATE LAW

In its brief (p. 19, last six lines - pp. 22), respondent contends that the State Insurance Fund's reassignment to petitioner of the latter's cause of action for personal injury damages, which had previously been assigned to the Fund when petitioner failed to bring suit on the cause of action within the time prescribed by law for doing so, is without force or effect because, respondent contends, the reassignment is interdicted by New York State statute. The statute respondent relies upon is the General Obligations Law, section 13-101, quoted in respondent's brief, at p. 20, which states, insofar as pertinent, that

"Any claim or demand can be transferred except in one of the following cases: Where it is to recover damages for personal injuries,..."

Respondent's contention, we submit, is, for the reasons which follow, without merit.

First,

"..... the main purposes of the general rule of non-assignability of claims for personal injury are not offended by this type reassignment (that is, reassignment back to the injured party). Those purposes, to prevent unscrupulous strangers to an occurrence from preying on the deprived circumstances of an injured person, and to prohibit champerty, simply have no applicability where the assignment is to the injured person himself."

> Caldwell v. Ogden Sea Transport (4 Cir., 1980), 618 F. 2d 1037, 1048 (at "13"; left hd. col.; matter in parentheses supplied).

In Hroncich v. Sun Export Holding Corp., not reported; (New York Supreme Court; New York County, Index #10877/81;

Greenfield, J.; June 23, 1982), reproduced in the Appendix Of Unreported Decisions attached to this brief, beginning at p. A 10 , infra, the court, citing Caldwell v. Ogden Sea Transport Inc. (4 Cir., 1980), supra, 618 F. 2d at p. 1047, stated as follows in reference to a reassignment back to the injured party, alluding to it as an "assignment":

> "Such an assignment does not violate the rule forbidding the assignment of personal injury claims (see G.O.L., section 13-101(1)), since the assignment revests in the LHWCA claimant the exclusive right to maintain action on the third-party claim in protection of his own and the employers (sic) beneficial interest. (See Caldwell v. Ogden Sea Transport, Inc., 618 F. 2d at 1047)" (penultimate par., A 14-A 15, infra).

Secondly,

> ".... No violence (is) done to the underlying statutory scheme by such a development (as) 'reassignment'".
>
> Caldwell v. Ogden Sea Transport, Inc., supra (4 Cir., 1980), 618 F. 2d, at p. 1047; matter in parentheses supplied), to be read with 1047-1048.

See, also, De Luzio Transamerican Trailer Transport, Inc., a/k/a Transamerican Trailer Ferry, Inc., not reported; (New York Supreme Court, New York County, Index # 12339/80; March 23, 1981); reproduced in the Appendix to this brief, beginning at p. A 2, infra; see, especially, penultimate par., and also generally; and see, also, Susino v. Akrion Shipping Co., S.A.; not reported; (New York Supreme Court, New York County, Index #13029/80; July 21, 1980; Wallach, Richard W., J.); reproduced in the Appendix to this brief, beginning at p. A 19, infra; also, Marullo v. Reederei Richard Schroeder, K.G. (D.C.S.D.N.Y., July 30, 1980), not reported; reproduced in the Appendix to this brief, beginning at p. A 16, infra.

Third,

> "..... the statutory scheme itself involves an initial assignment of the exclusive right to maintain the action, bespeaking a Congres-

sional rejection of any general common law rule against assignability of third person claims under LHWCA."

> Caldwell v. Ogden Sea Transport, Inc., supra (4 Cir. 1980), 618 F. 2d, at p. 1048 (at "13"; left hd. col.).

See, also, S. 1182 (97th Congress; 1st Session; Staff, Draft No. 3), proposed amendment to section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., section 933(b), providing that

> ".... If the employer fails to commence an action against such third person within a reasonable time after the cause of action is assigned under this section, the right to bring such action shall reassign (sic, probably should be 'shall be reassigned' or 'shall be deemed to have been reassigned') to the person entitled to compensation."

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for writ of

certiorari, the petition for said writ should be granted.

Respectfully submitted,

IRVING B. BUSHLOW
Counsel of Record
for Petitioner

A 1

APPENDIX OF UNREPORTED DECISIONS

APPENDIX OF UNREPORTED DECISIONS

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I
- - - - - - - - - - - - - - - - - - - -X

ONIELLO DE LUZIO,

Plaintiff,

-against-

Index No.
12339/80

TRANSAMERICAN TRAILER TRANSPORT, INC., a/k/a TRANSAMERICAN TRAILER FERRY, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - -X

ALTMAN, Myriam J., J:

In this personal injury action, defendant moves for summary judgment dismissing the complaint on the ground that it is time-barred (US Code, tit 33, sec. 933, subd(b)). Plaintiff is a longshoreman who, while in the employ of the John W. McGrath Corporation (McGrath), performed stevedoring work on a vessel chartered by defendant. In the course of his employment, plaintiff sustained knee and back injuries and subsequently claimed

compensation from his employer pursuant to the Longshoremen's and Harbor Workers' Compensation Act (US Code, tit 33, sec 901 et seq.). On November 22, 1974, plaintiff was awarded disability benefits pursuant to a compensation order signed by the Deputy Commissioner of the 2nd Compensation District. Some seventeen months later, on April 15, 1976, plaintiff served a summons with notice upon defendant. The complaint, alleging negligence on the part of defendant, was apparently served pursuant to demand on or about September 13, 1979.

Section 933 of title 33 of the United States Code governs the maintenance of third-party actions by a person in plaintiff's position. Subdivision b of that section provides as follows:

Acceptance of such compensation under

> an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Defendant claims that plaintiff's failure to commence this action within six months after the date of the compensation order resulted in an assignment of his cause of action to McGrath. For this reason defendant seeks summary judgment.

While the right to sue generally vests in the employer upon an employee's failure to bring suit within the requisite statutory time period, the assignment is not absolute and may be nullified (Rodriguez v Compass Shipping Co. Ltd., 617 F2d 955, cert gr 101 S Ct 69). There is a split in the Federal Circuit

APPENDIX OF UNREPORTED DECISIONS

Courts of Appeal concerning the circumstances under which such an assignment is nullified and the right to bring suit is revested in the employee. The Fourth Circuit has liberally interpreted section 933 (subd (b)) holding that the "right of action may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim nevertheless declines to do so for any reason" (Caldwell v Ogden Sea Transport, 618 F2d 1037, 1046).

The Second Circuit, on the other hand, has strictly applied the six-month time bar (Rodriguez v Compass Shipping Co. Ltd., 617 F2d 955, cert gr 101 S Ct 69, supra). However, while restricting the circumstances under which the right of action may revest in the employee,

the court did suggest that ratification of the action by the employer may permit the maintenance of a suit by the employee. The court found that upon expiration of the six-month time period the employer possessed the exclusive right to sue, but noted additionally that the employer "(had) not joined in the action or ratified its commencement even though it (had) had a reasonable time to do so" (Rodriguez v Compass Shipping Co. Ltd., supra, p. 958).

In a subsequent decision rendered by the United States District Court for the Southern District of New York, the court found that the compensation carrier had ratified or assigned the interest in the claim back to the plaintiff longshoreman and that his suit was not barred (Marullo v Reederei Richard Schroeder, K.G., US Dist Ct, SDNY, July 30, 1080, GOETTEL, J.). The court relied upon Rule 17

(subd (a)) of the Federal Rules of Civil Procedure which provides that "(n)o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by *** the real party in interest". In that case, a letter from the compensation carrier, wherein the carrier agreed to be bound by the results of the plaintiff's action and to waive its right to bring an action, was found sufficient to transfer the cause of action back to the plaintiff. The court rejected the defendant's claim that ratification had not occurred within a reasonable time. It found that, pursuant to Rule 17 (subd (a)), the "objection" was made when the defendant filed the motion to dismiss and that the ratification was ob-

tained within a reasonable time after this objection.

There appears to be no counterpart to the particular ratification provision of Rule 17 (subd (a)) in New York procedural law. However, the principle underlying Rule 17 (subd (a)) - the protection of a defendant against multiple actions - is equally applicable in state court. Therefore, the application of the reasoning of these recent Federal decisions to the instant case is warranted.

Plaintiff has submitted a letter from McGrath dated July 31, 1980 in which McGrath ratifies the action brought by plaintiff, agrees to be bound by its results and waives its right to bring its own action.

The six-month limitation contained in the Federal statute is not a statute of limita-

tions. It acts to accomplish an assignment of the claim to the longshoreman's employer, who may then bring suit on behalf of himself and the longshoreman. Although pursuant to the assignment, the action is brought by the employer, the longshoreman maintains an interest in the recovery (US Code, tit 33, sec. 933, subd (e), par (2)). Here there has been an actual assignment of that action back to the longshoreman. Such assignment has not imposed additional burdens upon the defendant as the substantive issues confronted by it are the same whether the party in interest as plaintiff is the injured longshoreman or his employer.

I find that plaintiff is the true party in interest and, accordingly, defendant's motion is denied.

DATED March 23, 1981 /s/ M.J.A.
J.S.C.

APPENDIX OF UNREPORTED DECISIONS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM, PART I

- -X

NIKOLA HRONCICH,

Plaintiff,

Index No. 10877/81

-against-

SUN EXPORT HOLDING CORP., et al.,

Defendants.

- -X

Greenfield, J.:

Defendant shipowner, Sun Export, moves and co-defendant, Weeks Crane, cross-moves to dismiss the action brought against them by a longshoreman on the ground that the action was not commenced within six months after plaintiff settled a compensation claim filed by him against his employer pursuant to the 'Longshoreman's and Harbor Workers Compensation Act (LHWCA)(33 USC sec 901 et seq)'.

APPENDIX OF UNREPORTED DECISIONS

Defendants contend that under LHWCA sec 933 (33 USC sec 933(b) and (h)), a longshoreman's right to recover damages against a shipowner is assigned to his employer, or to his employer's insurer in subrogation, if an action against the shipowner is not commenced by the longshoreman within six months after accepting compensation under an award in a compensation order.

In opposition, plaintiff asserts that the employer ratified the plaintiff's commencement of the action in his own name, waived any right to bring an action and agreed to be bound by the result. Plaintiff, therefore, contends that his suit is viable and should not be dismissed.

In Rodriquez v. Compass Shipping Co. (451 US 596) relied upon by defendants, the

court held that once there is an acceptance of compensation pursuant to an award in a compensation order and the passage of the six month period, the statutory assignment is triggered. "When the sec 33(b) (33 USC sec 933(b)) assignment occurs, it transfers the employee's entire right to commence a third-party action to the employer" (451 U.S. at 603).

The court noted that the 1959 amendments to the LHWCA did nothing to preserve the employee's right to commence a third-party suit after expiration of the six month period (but see Czaplicki v. The Hoegh Silvercloud, 351 US 525), and stated that "although the amendments encourage employers to pursue assigned claims, they do not qualify the assignee's control of the cause of action after the assignment takes place. *** (T)he legislative history indicates that once the 6-month period expires, the em-

ployer possesses complete control of the third-party claims" (Rodriquez v. Compass Shipping Co., 451 U.S. at 611-612).

The complete power of control exercisable by the employer includes the power to reassign the case back to the injured employer. (Caldwell v. Ogden Sea Transport, Inc., 618 F. 2d 1037 (4th Cir., 1980)).

In Caldwell, the court, using its equitable powers fashioned a mechanism whereby an employee could proceed to compel a formal reassignment of the right of action in those circumstances where it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason.

In its Rodriquez opinion (451 U.S. at 612-614), the court criticized the Caldwell

* "employer", manifestly, should be "employee".

court finding that the mechanism created by the Fourth Circuit was unsupported by any evidence that Congress created either the substantive right itself or the procedural rights set forth in the opinion.

However, in this case there has been no compulsion; no mechanism was employed to force the assignee to reassign. It is clear that under Rodriquez the employer, as statutory assignee, is free to institute suit or refuse to institute suit as it sees fit. It is also free to reassign or ratify an action brought by its employee. (See Miller v. Wells Fargo Bank International Corp., 540 F 2d 548 (2nd Cir., 1976)).

Such an assignment does not violate the rule forbidding the assignment of personal injury claims (See G.O.L. sec 13-101(1)) since

the reassignment revests in the LHWCA claimant the exclusive right to maintain action on the third party claim in protection of his own and the employers beneficial interest (See Caldwell v. Ogden Sea Transport, Inc., 618 F. 2d at 1047).

Accordingly, the motion is denied.

Dated: June 22 1982

E.J.G.
J.S.C.

APPENDIX OF UNREPORTED DECISIONS

E N D O R S E M E N T

GIOVANNI MARULLO V. REEDEREI RICHARD SCHROEDER, K.G., 79 Civ. 3757 (GLG)

Defendant moves to dismiss plaintiff's complaint because, since the action was not brought within six months of the date of the settlement of the compensation claim, the cause of action belonged to the compensation carrier pursuant to Title 33 U.S.C. sec. 933(b). In response to the motion the plaintiff has submitted a letter from the claims manager of the compensation carrier, Zurich Insurance Company. In it he states that pursuant to Rule 17(a) of the Fed. R. Civ. P. the company ratified the action of the plaintiff in suing the defendant. Moreover, the company's carrier stated:

> "We agree to be bound by the results of the plaintiffs (sic)

> action and will not bring an action for the release (sic) requested, and we will waive our right to bring an action in our name as the real party in interest herein."

Defendant argues that the letter is inadequate to correct the fact that the plaintiff lacks standing to bring the action, since he is not the real party in interest, and that even if the letter were a sufficient ratification pursuant to Rule 17(a), the ratification did not occur within "a reasonable time" as provided by the rule.

Merely sending a letter stating that the insurer "ratifies" the longshoreman's action would probably be insufficient to satisfy 33 U.S.C. Sec. 933(b) as interpreted by the Second Circuit decision in Rodriquez v. Compass Shipping Company Ltd., 617 F. 2d 955 (2d Cir. 1980). However, the letter from the insurance carrier, while

not artfully worded, amounts to an assignment of its interest in the claim. Under these circumstances, the plaintiff has again become the real party in interest and the requirements of Rule 17(a) have been met.

With respect to the claim that the ratification did not occur within a reasonable time since the accident occurred three years ago, it is not the date of the accident which initiates the need for ratification. Pursuant to the rule, the time commences "after objection". The "objection" was not made until the defendant filed the instant motion. Consequently, the ratification has occurred within a reasonable time.

The motion is denied.

SO ORDERED:

Dated: New York, New York
July 30, 1980

/s/ Gerard L. Goettel
U.S.D.J.

APPENDIX OF UNREPORTED DECISIONS

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

- -X

GIUSEPPE SUSINO,

Plaintiff

-against-

Index No. 13029/80

AKRION SHIPPING CO., S.A.,

Defendant

- -X

WALLACH, RICHARD W., J.:

Defendant moves for an order dismissing this action for personal injuries brought by a longshoreman against a shipowner as not having been brought within six months after plaintiff settled a compensation claim filed by him against his employer and accepted the agreed-upon sum. The motion is based upon the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. 933(b) and (h) under which a

longshoreman's right to recover damages against a shipowner is assigned to his employer, or to his employer's insurer in subrogation, if an action against the shipowner is not commenced by the longshoreman within six months after accepting compensation under an award in a compensation order. In opposition to the motion, plaintiff offers a document signed by a representative of his employer's insurer, the authenticity of which is not challenged by defendant, wherein the insurer represents to "ratify" this action and "waive" any right it might have to bring an action in its own name. Whether such effective* to revert the right of action in the longshoreman is an issue which was addressed by the United States Court of Appeals, Fourth Circuit, in the case of Caldwell v. Ogden Sea Transport, Inc., 618 F. 2d 1037, at 1043-1048. Reasoning that the purpose of the Act was to

*Whether "such effective" should probably be "Whether such is effective".

give the right of action over "to that one of the two beneficially interested parties normally best able in terms of resources and experience to prosecute it", the court found that the statutory purpose would not be violated should the statutory assignee renounce his exclusive right of action by either formal* reassigning it to the longshoreman or otherwise indicating a knowledgeable and deliberate relinquishment of his exclusive right to control prosecution of the claim. "The possibilities for establishing liability are not enhanced; the bar of the limitations period to suit on the underlying claim is not affected; and the interest in facing only one action in respect of the two beneficial interests in the claim is unaffected." (supra, at 1047). The court concurs with this reasoning. The cases relied upon by defendant (Rodriguez v. Compass Ship-

*"formal" should probably be "formally".

ping Co. Ltd., 617 F. 2d 955, Smith v. Hansa Deutsch, 76 Civ. 1110, April 14, 1980) do not address the issue of whether a formal reassignment or waiver of the exclusive right of action given the employer or its subrogee under the Act is effective to revest the right of action in the longshoreman. It is significant however, that the court in Rodriquez, in noting that the employer therein had not ratified the action commenced by the longshoreman even though it had had a reasonable time to do so (supra, at 958), implies that such a ratification might be sufficient to overcome a defense grounded on the statutory assignment. Accordingly, the motion is denied.

Dated: September 24, 1980

/s/ R.W.W.
J.S.C.